Shakopee Mdewakanton Sioux Community

2330 SIOUX TRAIL NW • PRIOR LAKE, MINNESOTA 55372
TRIBAL OFFICE: 952•445-8900 • FAX: 952•445-8906

OFFICERS
Stanley R. Crooks
Chairman
Glynn A. Crooks
Vice Chairman
Keith B. Anderson
Secretary/Treasurer

November , 2006

Philip Hoge Chairman
National In n Gaming Commission
1441 L Stre NW, Suite 9100
Washingtor DC 20005

Re: Comments on Class II Classification Standards and Electromechanical Facsimile Definitions

Dear Chairm n Hogen:

I am receipt of the NIGC's proposed classification standards for Class II games and definitions f "electronic or electromechanical facsimiles" published in the Federal Register on May 25, 20(On bchalf of the Shakopee Mdewakanton Sioux Community ("SMSC"), I submit the followin written comments. Although the proposed regulations will not have a significant impact on th SMSC because it primarily conducts Class III gaming, the SMSC believes that there are sig ficant problems with the proposed regulations that merit comment.[1]

THE OPOSED REGULATIONS NEED TO BE POSTPONED.

As a nitial matter, in light of the unanimous opposition voiced by tribal leaders at the public heari on September 19, 2006, the SMSC requests that the proposed regulations be postponed. he NIGC insists on moving forward with this rulemaking, it should at a minimum, take the foll ing actions: i) release a revised draft, which takes into account the serious objections th have been raised by tribal leaders; ii) allow additional time for Tribes to review the two Ecor nic Impact Reports posted by the NIGC on November 6, 2006; and iii) extend the comment pe d.

THE OPOSED REGULATIONS WOULD GREATLY HARM TRIBAL ECONOMIES.

The p posed regulations pose a serious threat of immense economic harm to tribes. There are ap oximately 50,000 Class II electronic game stations in use by tribes today,

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[1] The oposed regulations would have a significant impact on many Class III gaming tribes, as tribes unable t chieve good-faith compact negotiations for new, renewed, or expanded Class III compacts will se alternatives and leverage in those negotiations.

generating e er two billion dollars of revenue annually. Based on conservative, unofficial projections, ibal governments stand to lose over one billion dollars of that revenue per year under the p posed rules. This means that a prime source for the funding of tribal governmental programs, i astructure and other essential tribal needs will be cut roughly in half. Furthermore, the financia mpact of the proposed regulations would also be felt outside of the reservation economies e ce tribal governments are the largest employer in many areas of the country that would be af cted. The proposed regulations would cause a disproportionate loss of jobs at Class II facilities, otentially leading to the loss of tens of thousands of American jobs in areas of the country tha an least afford it. All of these losses and costs, especially when associated with a rulemaking at is completely unsupported by law, are unacceptable.

THE IGC FAILED TO ENGAGE IN MEANINGFUL GOVERNMENT-TO-GOVERNMENT CON ULTATION.

The ASC is also concerned with the manner in which the NIGC developed the proposed regulations. he current rulemaking process lacked meaningful consultation with tribes, in violation of e NIGC's official tribal consultation policy. *See* 69 Fed. Reg. 16973 (2004).

In th consultation policy, the NIGC recognizes and commits to adhere to numerous fundamenta rinciples of Federal Indian law (e.g., sovereignty of Indian tribes over members and territory ndian tribes retain and exercise primary sovereign authority over operation and regulation o aming on tribal lands, etc.) in its rule making and other activities and agrees that:

> To th fullest extent practicable and permitted by law, the NIGC is committed to regu , timely, and *meaningful* government-to-government consultation with Indi tribes, whenever it undertakes the formulation and implementation of new or re sed Federal regulatory policies ... for Indian gaming, ... which may subs tially affect or impact the operation or regulation of gaming on Indian land y a tribe(s) under IGRA.
>
> The IGC will strive to provide adequate opportunity for affected tribes to inter t directly with the Commission, to discuss and ask questions regarding the subst ice and effects of the proposed Federal regulations and standards and relat issues, and to provide *meaningful input* regarding the legality, need, natu form, content, scope and application of the proposed regulations, including oppo nity to recommend other alternative solutions or approaches.
>
> As p of the tribal consultation process, the NIGC will answer tribal questions and c *efully consider all tribal positions and recommendations*, before making its fi l decision ....

Id. at p. 169 (emphasis added).

The g als of the tribal consultation policy are commendable. However, the policy is of little value i e NIGC merely goes through the motions of government-to-government consultation ithout giving any weight to tribal input. In this particular instance, despite the

formation c tribal advisory committee to provide comments on the previous drafts of the classificatic rules, the NIGC did not incorporate tribal input on key issues. Specifically, NIGC chose to dis gard the following recommendations advocated by tribes: i) allow automatic daubing (co ring) for the entire game of bingo; ii) eliminate time delays for adding players and covering in ngo; iii) eliminate the requirement for multiple bingo draws or releases; iv) authoriz wholly electronic pull-tab games; and v) keep the current definition of "electronic or electrom hanical facsimile" of games of chance.

Alth igh common sense tells us that consultation will involve some level of disagreeme tribes cannot be said to have had meaningful government-to-government consultatior r meaningful input in the development of the proposed regulations when the NIGC so complete disregarded the input of the tribal representatives on these key issues.

THE ROPOSED REGULATIONS S ARE INCONSISTENT WITH CONGRESSIONAL INTENT AND HREATEN THE ECONOMIC VIABILITY OF CLASS II GAMING.

The oposed rules are inconsistent with Congressional intent to the extent that they attempt to p vent tribes from utilizing present advances in technology in the operation of Class II games. T s Congressional intent to allow the use of technology is evident in the Senate Report acco panying the bill that was enacted as the IGRA, which provides that tribes should have maxim n flexibility to use technology in Class II gaming:

> Con tent with tribal rights that were recognized and affirmed in the *Cabazon* deci n, the Committee intends ... that tribes have maximum flexibility to utilize gam such as bingo and lotto for tribal economic development. The Committee spec cally rejects any inference that tribes should restrict class II games to exist g games sizes, levels of participation, or current technology. The Com ittee intends that tribes be given the opportunity to take advantage of mod n methods of conducting Class II games and the language regarding tech logy is designed to provide maximum flexibility.

S. Rep. No. 00-446, U.S.C.C.A.N. 1988, pp. 3071, 379.

The GC's sudden determination that new regulations are needed to slow down technologic y-aided games and make them sharply distinguishable from their Class III counterparts wholly inconsistent with Congressional intent, as well as its prior actions interpreting e IGRA. NIGC has chosen to repudiate its own 2002 regulations in favor of an approach tha eliminates most variants of bingo, slows the play of those that remain, and prevents any meaningful play of electronic pull-tabs. The NIGC proposes these regulations even though there re no such restrictions on Class II games within IGRA.

In ca ying out its perceived mandate to slow Class II games down, the NIGC picks and chooses fror various federal court cases to cobble together bright line restrictions. The

proposed re ılations mention various court cases evaluating challenges to Class II aides, but then only a ly selective aspects of those case precedents. As an example, the proposed rule incorporate he conclusion of carly pull-tab cases that all electronic pull-tabs are Class III facsimiles a l are therefore prohibited, even though the original rcasoning of those cases may no longer be v: d. The NIGC then goes further by imposing additional restrictions with entirely no case preced t whatsoever (e.g., player terminal may not accumulate credits or award cash - player must edeem pull-tab winnings through a clerk or kiosk, etc.). These further restrictions greatly hinc player flexibility and the use of current cashless technology, without any legal justificatio:

The IGC also treats court precedents on bingo in this selective manner. After citing to language fr: the Ninth Circuit case approving the Megamania game to the effect that IGRA's three explic criteria constitute the sole legal requirements of the game to count as Class II bingo, notw ıstanding what "a nostalgic inquiry into the vital characteristics of the game as it was played our childhood or hometowns might discover," thc NIGC sets forth a modification that sideste the Ninth Circuit's ruling and rejects earlier NIGC regulations by requiring thc play of "cla c" bingo. The NIGC states its opinion that IGRA's three simple statutory criteria are being bl red by technological advances and proceeds to draw new and different lines, with multiple nc criteria governing the play of the game of bingo when played through the use of a technologic d. With the addition of thesc new criteria, games of bingo and games similar to bingo will h e fewer variations than those played on paper at the time IGRA was cnacted, even if those mig still be permitted as paper games.

Indi gaming generally, as well as Class II gaming under the current regulatory scheme in particular greatly benefits Indian tribcs across the country while serving the twin goals of promoting e nomic development for tribes and protecting the intcgrity of thc Indian gaming industry. Tl proposed regulations threaten the economic viability of Class II gaming by imposing ar rary requirements meant to slow the Class II games down, such as requiring multiple bin draws and releases, creating significant time delays in bingo games, requiring a certain size bingo cards (including the requirement that the card take up at least half a video screen), ma ating written notifications that a devicc is a bingo game, and emasculating any electronics i he game of pull tabs. The proposed regulations envision games that prospective customers a simply not interested in playing in today's day and age.

THE ROPOSED REGULATIONS REPRESENT AN IMPERMISSIBLE INTRUSION ON TRIBAL SOV EIGNTY.

The oposed regulations intrude upon tribal sovereignty by usurping the role of tribal governments s the primary regulators of tribal gaming under the IGRA. Although the NIGC gives lip-se ce to the fact that tribes are the primary regulators for Indian gaming, it proposes a certification ocess that supplants the authority of tribal regulatory bodies. The proposed rules essentially r ıove control of the regulation of Class II gaming from tribal gaming commissions, shifting auth ity to the NIGC.

Und the proposed regulations, the NIGC will have exclusive authority to regulate the testing and tification of electronic gaming devices by independent laboratories. This effectively es the NIGC the sole authority to dictate which devices meet minimum NIGC standards to e classified as Class II gaming. With minimal "grand-fathering," tribes would be permitted to lace and operate only such certified games. Few, if any, of the currently existing games woul comply with the proposed regulations, even those already approved by federal courts, triba gaming commissions, or even by the NIGC itself.

An a litional problem with the proposed certification process is that only the NIGC Chairman n object to a classification decision, as the proposed regulations give tribes no such option, exce in defense of an enforcement action. The proposed certification process is also problematic that the independent gaming laboratories must be approved on an annual basis and may los hat approval if the NIGC is dissatisfied with their certification decisions.

Und the proposed scheme, tribal governments would be excluded from any meaningful participatio n the classification of games. For all practical purposes, they would also be deprived of e authority to make this critical legal determination, which would be transferred to independen me testing laboratories required to apply rules wholly controlled by the NIGC, and subject NIGC oversight alone. Tribal governments would not even be permitted to establish an ely on their own game testing labs, nor would they be able to authorize the placement o games on the floor without approval by a NIGC-supervised testing laboratory. The proposed re lations represent an extraordinary and unlawful shift of governmental authority to the private s tor and a statutorily unauthorized impingement on the sovereign rights and authority of bal governments.

THE ROPOSED REGULATIONS CONTAIN AN UNWORKABLE COMPLIANCE DEADLINE.

The SMSC is concerned with the proposed regulations six (6) month deadline for compliance. Manufacturers have publicly testified that they will likely not be able to develop and manufa re a market-worthy variety of compliant games by the deadline. The implementat n of the NIGC's certification program (and the flood of initial submissions) will certainly len hen the time between the deadline and making compliant games available to the public. Trib will not be allowed to offer Class II aids during this time period, effectively stripping the of their rights under IGRA. As a result, the six (6) month deadline must be extended.

REC MENDED CHANGES TO THE PROPOSED REGULATIONS.

At a nimum, the following changes are needed in order to make the proposed regulations c nply with existing law, as well as to make them actually workable:

1. Clari the discrepancies between the regulation preamble and the actual regulation

lang age, as there are currently significant differences (e.g., screen display discrepancy [wh ner 50% of screen applies to bingo card or entire bingo game content], daub time [pre able says if everyone daubs no waiting, while regulation says players must wait 2 seco ds after everyone daubs], etc.).

2. Incl e a due process provision for tribes to appeal a negative classification decision.

3. Incl e a "grandfather" provision for any game already approved by the NIGC and for thos games complying with such approvals.

4. Exte l the provision for the transition period from six months to a more realistic eighteen mon s.

5. Dele the requirements extending game play time requirements.

6. Revi the proposed regulations to allow pre-drawn numbers.

7. Ther should be no distinctions on the use of electronic media (i.e., permit electronic pull tab c cks).

8. Dele the NIGC's certification of gaming laboratories.

9. Dele the provisions on specified prize values.

10. Dele the requirements for sleeping.

11. Perm Tribal Gaming Commissions to evaluate and approve Class II operations for their own cilities.

In cl ing, the SMSC hopes that the NIGC will seriously reconsider its attempt to adopt regulations t are so contrary to the intent of Congress, as well as potentially damaging to Class II gam g. The NIGC should (1) withdraw the proposed regulations pending additional meaningful nsultation with Indian tribes; (2) allow additional time for the Tribes to review the two recently osted Economic Impact Reports; or (3) at the very least, incorporate the changes recommend above. The SMSC will reserve the right to submit additional commentary on the November 6 2006, Alan Meister and BMM Reports.

Sincerely,

Stanley R. Crooks
Chairman

Shakopee Mdewakanton Sioux Community

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Stanley R. Crooks
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Secretary/Treasurer

FAX COVER SHEET

To:	**Philip L gan, Chairman National ndian Gaming Commission**	**FAX #:**	**202-632-7066**
From:	**Chair n Stanley R. Crooks Shako e Mdewakanton Sioux Community**	**FAX #**	**952.233.4218**
Date:	**11/14/0**	**Time:**	
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